# THE PRESIDENCY

WILLIAM HOWARD TAFT

# THE PRESIDENCY

## ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS

*University of Virginia*
*Barbour-Page Foundation*

# THE PRESIDENCY

ITS DUTIES
ITS POWERS, ITS OPPORTUNITIES
AND ITS LIMITATIONS

THREE LECTURES
BY
WILLIAM HOWARD TAFT

NEW YORK
CHARLES SCRIBNER'S SONS
1916

Published April, 1916

## THE BARBOUR-PAGE LECTURE FOUNDATION

The University of Virginia is indebted for the establishment of the Barbour-Page Foundation to the wisdom and generosity of Mrs. Thomas Nelson Page, of Washington, D. C. In 1907, Mrs. Page donated to the University the sum of $22,000, the annual income of which is to be used in securing each session the delivery before the University of a series of not less than three lectures by some distinguished man of letters or of science. The conditions of the Foundation require that the Barbour-Page lectures for each session be not less than three in number; that they be delivered by a specialist in some branch of literature, science, or art; that the

lecturer present in the series of lectures some fresh aspect or aspects of the department of thought in which he is a specialist; and that the entire series delivered each session, taken together, shall possess such unity that they may be published by the Foundation in book form.

## EDITORIAL NOTE

The lectures that comprise this volume were delivered at the University of Virginia in January, 1915. Except for slight changes in points of detail, chiefly dependent upon the difference in time between their delivery and their publication, they appear in their original form.

# I

I claim no special learning from the books as to the presidency, but I can bring practical experience that the necessary paucity in living ex-Presidents makes somewhat exceptional. Mr. Squeers, in explaining to Nicholas Nickleby the system of vocational and practical study pursued at Dotheboys Hall, required the boy first to spell "winders" and then to go and clean "winders," in order that the subject might be well fixed in his mind. I have merely reversed the process, and, having tried to clean the "winders," I am here to make some effort correctly to spell the word. The question of the presidency, its duties, its responsibilities, and its limitations, ought, perhaps, to be settled, not in the heat of the issues that constantly arise in its exercise, but in the careful study, from an unbiased standpoint, of the historian and the jurist. Still,

no such determination will be a fair one that does not give some weight to the practical considerations that must influence him. While he may not appear to be the fairest judge of the field of jurisdiction which the Constitution intended for him, his views upon the subject, from the standpoint of an actor, may contribute something to the solution of the question arising. I may add, on the other hand, that retirement from office to a place of study and contemplation, rather than of action, modifies somewhat the views formed *dum fervet opus*. This, I think, is significant of the importance that should be attached to insistence upon constitutional limitations, and the wisdom of having those limitations from time to time interpreted by another branch of the government than that to whose action they are to apply.

The inefficient performance of their executive functions by the Continental Congress and the ad interim committees of that Con-

gress, no one can doubt who will read the correspondence of Washington during the Revolution or observe the stagnant chaos there was after independence was won. Nevertheless, the example of the one-man power under George III, which he maintained by his corrupt control of Parliament, made the convention doubtful as to the method by which, and the persons through whom, the executive power should be exercised. Roger Sherman, representing a minority, thought that the executive should be the mere agent of the legislature to carry out their will expressed in detail, and Randolph, of Virginia, supporting Sherman's view, contended further that the executive should be vested in a number of persons. Hamilton, at the other extreme, thought that the executive should be selected for life and should be given ample powers independent of the legislative branch. The happy result which was reached between the two extremes is only one of many instances of the triumph of clear-headed common sense, wise patriot-

ism, and the personal sacrifice of cherished notions which we find in the compromises embodied in our wonderful Constitution.

I am strongly inclined to the view that it would have been a wiser provision, as it was at one time voted in the convention, to make the term of the President seven years and render him ineligible thereafter. Such a change would give to the executive greater courage and independence in the discharge of his duties. The absorbing and diverting interest in the re-election of the incumbent taken by those federal civil servants who regard their own tenure as dependent upon his would disappear and the efficiency of administration in the last year of a term would be maintained. I think it would have been better, too, to bring the executive a little closer in touch with Congress in the initiation of legislation and its discussion, notably in the matter of budgets and the economical administration of governmental affairs. But we are in an age of iconoclasts, and should a movement gain force to introduce some

slight amendments which experience would sustain, the benefit to be derived might be far outweighed by the danger of radical changes in the Constitution subversive of the great benefits that it has secured to the American people.

As every President has to do, I made many addresses, and the gentlemen who introduced me, by way of exalting the occasion rather than the speaker, not infrequently said that he was about to introduce one who exercised greater governmental power than any monarch in Europe. I need not point out the inaccuracies of this remark by comparing the powers of the President of the United States with those of the rulers of countries without really popular legislative government. In parliamentary governments (responsible governments, so called), the head of the state, if he is a King, reigns but does not rule, and if he is a President, or a governor-general, presides but does not govern. There is one in such a government, however, who exercises in some respects a greater

power than the President has. He is the leader of the majority in the popular house. He is the premier, and exercises both executive and legislative functions. The executive head of the state, whether King or President, follows his recommendations in executive work, and he, with his colleagues in his cabinet, control the legislation. Now, it would be idle to discuss which is the better form of government. It may be generally said that those who have a parliamentary, responsible government, as it is called, like that form, and that we like our form. Ours is more rigid, in that it divides the executive from the legislative, but is like parliamentary government in that in both the judicial branch is independent of the other two. Our ancestors acted much under the influence of Montesquieu, and believed that in the independence and separation of the legislative, the executive, and the judicial branches lay greater security for civil liberty.

It is often said that parliamentary government is more responsive to the will of

the people than our rigid system of an election of a President every four years and of a Congress every two years. This is hardly accurate. The government is responsive to the views of the majority of the members of the more popular house of parliament, and, if those views do not change, it may last, in England at least, for five years without consulting the popular electorate. The executive and the legislative branches are thus not affected by change in popular opinion unless the same change affects members whose views it is naturally difficult to change because elected as partisans and supporters of the policies of the existing government. In other words, a responsible parliamentary government is responsible to a particular parliament, not to the people. Such a government offers greater effectiveness, in that the same mind or minds control the executive and the legislative action, and the one can be suited to the other; whereas our President has no initiative in respect to legislation given him by law except that of

mere recommendation, and no legal or formal method of entering into the argument and discussion of the proposed legislation while pending in Congress. To one charged with the responsibilities of the President, especially where he has party pledges to perform, this seems a defect. But whatever I thought while in office, I am inclined now to think that the defect is more theoretical than actual. It usually happens that the party which is successful in electing a President is also successful in electing a Congress to sustain him, and the natural party cohesion and loyalty, as well as a certain prestige which the President has when he enters office, make his first Congress one in which he can exercise considerable moral influence in the framing and passage of legislation to fulfil party promises. The history of the present administration, and that of many previous administrations, bears me out in this. Not infrequently the second Congress of an administration contains a majority politically adverse to the President in either one

or both of its houses, and, when that is the case, legislation is limited to appropriation bills and non-political measures, if there are any such. The President in such a case naturally chafes under an inability to put through important bills which he deems of the highest value. On the whole, however, I do not think the country suffers. Certainly not in this age and generation, when the bane of political methods, when the danger to the best interests of the country, is in the overwhelming mass of ill-digested legislation. Senator Root, in his recent American Bar Association address, said that in Congress and the State legislatures this amounted to sixty-five thousand different enactments in the last four years.

We live in a state of politics and public mind where legislators seem to regard the *passage* of laws as much more important than the results of their *enforcement.* Too often the value of the legislation is not in the good, intrinsic results of its operation, but in its vote-getting quality—in its use as molasses

for the catching of political flies. Therefore, a system in which we may have an enforced rest from legislation for two years is not bad. It affords an opportunity for digestion, for the development and detection of defects in laws already enacted. Bars in music are used in the maintenance of harmony. The world is not going to be saved by legislation, and it is not going to be injured by an occasional two years of respite from the panacea and magic that many modern schools of politicians seem to think are to be found in the words: "Be it enacted."

The functions of the President are both legislative and executive. Among the executive functions we shall find a gradual tendency to a division into the purely executive and the quasi-legislative and quasi-judicial duties. The veto power, however, is purely legislative. The Constitution provides that after both houses shall have passed a bill it shall be presented to the President; that if he approve he shall sign it, but if not he

shall return it with his objections to the house where it originated, which shall proceed to reconsider it; and that if two-thirds of that house agree to pass the bill it shall be sent, with the objections of the President, to the other house, where it shall be reconsidered, and if approved by two-thirds of that house it shall become a law. It has been contended that this veto power is executive. I do not quite see how. Of course, the President does not take part in the framing of the bill, in the discussion of it, or in its amendment. He has no power to veto part of the bill and allow the rest to become a law. He must accept it or reject it, and even his rejection of it is not final unless he can find one more than one-third of one of the houses to sustain him in his veto. But even with these qualifications he is a participant in legislation, and, except for his natural and proper anxiety, due to the circumstances, not to oppose the will of the two great legislative bodies, and to have harmony in the government, the circum-

stances which govern him in his action must be much like those which control the members of the legislature. In the Constitutional Convention there were proposals looking to the revision of bills which had passed both houses by a council, to include the President and the supreme judges, with the power to reject bills transgressing the constitutional limits of congressional discretion. Very wisely the proposal was abandoned, and what was done was to adopt, in modified form, the provision for the royal veto in the British constitution.

A discussion of the veto power by Mr. Edward Campbell Mason, in a Harvard publication, gives an interesting review of its origin. The author expresses the opinion that the veto is the result of the shrinking of a real legislative function of the King, exercised at first broadly and affirmatively and gradually restricted by the growth of parliamentary power. He points out that in early days laws were enacted on a petition of Parliament to the King, for legislation, and

a proclamation of the King embodying the law as he was willing to have it. For a long time he did not confine himself to the request in the petition; but after Parliament acquired greater influence it presented to the King the proposed statute, drawn in proper and exact terms, and successfully resisted his giving it a different form. Thus the King's function in legislation became one of negation only. This history of its origin shows that, even in the limited and suspensive form it has in our Constitution, the veto is legislative, a brake rather than a steam-chest, but, nevertheless, a very important part of the machinery for making laws.

This conclusion helps the President to answer correctly the practical question often presented to him, whether he is limited, as some contend, to vetoing a bill only when he thinks it unconstitutional. I have no hesitation in rejecting such a view. If anything has been established by actual practise, it is that the President, in signing a bill, or returning it unsigned, must consider the expedi-

ency and wisdom of the bill, as one engaged in legislation and responsible for it. The Constitution used the word "approve," and it would be a narrow interpretation to contract this into a mere decision as to legal validity.

There were only four Presidents, Mr. Mason says, who did not exercise the veto power—Washington, the first Adams, Jefferson, and the second Adams. They were Presidents who were fortunate enough to have friendly Congresses in their terms of office. It is an old maxim that there are other ways of killing a cat than by choking it with butter, and it is a great deal easier—it does not rock the boat so much—to use one's influence with the legislators to prevent objectionable bills passing than it is to wait until they do pass and then veto them. Only once in Jefferson's time was he seriously opposed to a bill presented to him. That was the repeal of the embargo of 1808, but he did not veto the repeal because many of his friends felt the inadvisability of con-

tinuing the embargo, and he yielded sadly to the necessity. Of course the vetoed bills are greatest in number when the President and Congress differ politically, and it is at such a time that one hears congressmen of the opposition denounce, with all the eloquence and emphasis possible, the exercise of the royal prerogative which defeats the will of the people. When one in the presidential office first hears those words, visions of the fate of Charles I may trouble him some, but after a time he becomes accustomed to that well-worn expression of legislators whom the veto of a favorite bill has disappointed. The truth is that it often happens that the President more truly represents the entire country than does a majority in one or both of the houses. His constituency is the electorate of the entire United States, and by reason of that he is much freer from the influence of local interest and of the play of those local forces which, united together by log-rolling, sometimes constitute a majority in both houses

for certain kinds of legislation—like a river-and-harbor bill or a public-building bill. To criticise the President's use of the veto as the exercise of a royal prerogative is absurd. Historically, the function finds its prototype in the royal veto of the British constitution; but no King of England has exercised it for two hundred years. He would lose his throne if he did. Here the veto is, not the act of an hereditary monarch, but of one elected by all the people to represent all the people and charged by the fundamental law with the responsibility of its exercise.

The President, in considering the constitutionality of a bill presented to him for signature, is in a different position from that of the Supreme Court when the validity of an act of Congress is in question before it. This is the distinction which the elder Professor Thayer, of Harvard, so wisely and ably explained and emphasized. A serious doubt of the validity of a proposed bill may well lead a member of Congress to vote against

it, or the President to veto it, while such a doubt will not justify the court in treating the act as a nullity, unless the court reaches an indisputable conviction that Congress has exceeded its powers, after indulging the properly strong presumption in favor of the act's validity. It may very well happen, therefore, that a President may veto a bill, Congress may pass it over his veto, the Supreme Court may sustain the law, and yet the President and the court have the same view in regard to the act. I have in mind a bill which I vetoed and which was passed over my veto. It was the so-called Webb bill, which declared the shipping of liquor from one State into another, where its sale was unlawful by the law of the State, to be federally unlawful. It seemed to me that this was in effect a delegation of power to the States to make differing rules with respect to interstate commerce in something which up to this time has been regarded as a lawful subject of such commerce, and that it was, in fact, *pro tanto* a repeal of the inter-

state commerce clause of the Constitution by a congressional act. If Congress wishes to declare liquor an unlawful subject of commerce from one State to another, Congress probably has the power; but to yield to Congress the power to say that one State may declare something thus unlawful among the States, while another may declare it lawful, it seemed to me was a serious interference with the beneficent operation of the interstate commerce clause. I reached this conclusion from what appeared to me the necessary implication from the judgments of the Supreme Court; but I had much less hesitation in vetoing the bill than the court should have in declaring it to be beyond the permissible limits of congressional discretion.

I emphasize this point because I think that it is of the highest importance that the constitutional validity of a measure should be fairly considered in the legislature and by him who exercises the veto power. I have observed a criticism of our system of legis-

lation under a written constitution by some English publicists, that it leads to a discussion of questions of validity of proposed legislation rather than of its expediency. This criticism does not seem to me to be weighty or correct. We don't discuss the validity of acts enough in legislatures, and I doubt if governors consider as much as they ought the limitations of the fundamental law in signing bills. Our legislatures have thrown too much of the burden of maintaining constitutional limitations on the courts by an utter disregard of the Constitution themselves. This recklessness has, in fact, weakened the weighty presumption courts ought to indulge in favor of the validity of legislative action. Legislatures have thus forced on courts the duty of annulling many laws palpably in the teeth of the Constitution, and shifted to the court that responsibility for their defeat that the legislatures should have assumed.

The veto power does not include the right to veto a part of a bill. The lack of such a

power in the President has enabled Congress, at times, to bring to bear a pressure on him to permit legislation to go through that otherwise he would veto. Appropriation bills are necessary for the life of the government, and if Congress, by putting a "rider" of general legislation on one of these, says, "We will throttle the government unless you consent to this," it puts the President in an awkward situation. Still, I think the power to veto items in an appropriation bill might give too much power to the President over congressmen. It is wiser to leave the remedy for the above to the action of the people in condemning at the polls the party which becomes responsible for such riders than to give, in such a powerful instrument, a temptation to its sinister use by a President eager for continued political success.

There is an aspect of the power of veto of items in an appropriation bill that, of course, ought not to be ignored. The wasteful extravagance that we now have in Congress and in legislatures, and the alarming increase

in the total of annual appropriations, brings home to every student of political tendencies a danger that confronts us. We have been very rich. Our tax resources have been so great that the only side of the ledger which our legislators have taken great interest in has been the side of expenditures. They have proceeded on the assumption that there would always be money enough, even if we had to pass a war-tax bill to raise it. A President with the power to veto items in appropriation bills might exercise a good restraining influence in cutting down the total annual expenses of the government. But this is not the right way. The right way, as shown in England and other countries where expenditures have, of necessity, to be counted and proportioned to resources, is a budget, stated at the beginning of a session, which shows the sources, first, and then the possible expenditures. Both sides of the account are fully stated before Parliament acts, and that is what we should have in this country. Congress, without any con-

stitutional amendment or even legislation, might give it. If the appropriation committee of each house and the Ways and Means Committee were united, and this new committee were given jurisdiction to prepare all appropriation bills, there is not any reason at all why they might not have a proper budget. But now, with appropriation bills divided between a dozen committees, and with a different committee to provide the revenue, Congress can have no idea, in passing on appropriation bills, of the total of appropriations, on the one hand, and no idea of its relation to probable income, under existing revenue acts, on the other. Everything is confusion, and, as Mr. Fitzgerald, chairman of the appropriation committee in the house, recently said, "It is a horrible mess."

The Constitution provides that if the President does not return the bill presented to him within ten days (Sundays excepted) after its presentation it is to become law just as if he had signed it, unless Congress

by adjourning prevents its return, in which case it is not to become a law.

It has never been decided by the Supreme Court whether a President by signing a bill within ten days after its passage may give it validity as a law if Congress adjourns within that ten days and before his signature. The court has said that he may sign a bill during a recess of Congress. It seems to me, however, that the practise makes clear that he may not do this after adjournment. There is only one instance of such a signature. President Monroe failed to sign a bill which he had intended to sign. After conferring with his cabinet he decided that it was wiser to ask Congress to re-enact it. President Lincoln did sign a bill after an adjournment and the bill was filed with the secretary of state and printed among the statutes. When the matter was brought to the attention of the Senate, however, the power of the President to do so was questioned and denied, and a new bill of substantially the same purport passed

both houses and was signed by the President.

The language of the Constitution with reference to what the President shall do with a bill leaves only two alternatives, one that if he approve he shall sign the bill, the other that he shall return it with his objections. It does provide that if he fails to return it within ten days it shall become a law, but this would seem to be only a provision for his neglect. In practise, however, some Presidents have allowed bills to become law without their signature, with the idea, I presume, that objections to the bill prevented affirmative approval and yet were not of such a character as to justify a veto. Mr. Cleveland looked at the matter in this way when he allowed the Wilson-Gorman tariff bill to become a law without his signature, though he had denounced it in most emphatic terms in a letter to Mr. Catchings, of the house, as an act of perfidy and dishonor. My own judgment is that the wiser course in such a case is for the President to sign the

bill, with a memorandum of his reasons for doing so, in spite of his objections.

What is called a pocket veto is exercised near the adjournment of Congress, when the President does not find time to examine a bill carefully because it is handed to him at the last moment, and by failing to sign it he prevents its becoming law. This is a proper practise, and tends to make Congress chary of presenting, at the last moment, bills of doubtful expediency or validity, because such a pocket veto is final and no opportunity is given to Congress by a two-thirds vote to override it.

I don't think that in the century and a quarter of our political history we have suffered from abuses of the veto power, and certainly a number of instances can be pointed to where the President has saved the country from a step that would have been attended with great danger and humiliation. One of the notable instances is the veto of the inflation bill by General Grant. If the people really want legislation, a veto will not pre-

vent it. It may delay it two years, but in the end the people must prevail, and a delay of two years or four years in legislation doubtful enough to prompt a successful veto is not likely to involve any such injury to the public weal as may be brought about by an irrevocable step in its dishonor and virtual repudiation like the inflation bill.

Experience shows that no President exercises the veto power for the fun of it. Naturally, he must have reasons of a very serious nature to set up his judgment against that of a majority in both houses, and he should show in his objections, not a mere difference of opinion as to the expediency of the bill, but the presence in it of features so injurious in their immediate effect upon the public weal, or so vicious as a precedent, that he is entitled to suspend the effect of the legislative will until further consideration be given the matter by the people.

Having thus considered the legislative power of the President, I come now to his

strictly executive functions. The less important and more formal powers can be grouped in one head. He is given the power to consult the heads of executive departments as to questions arising in their respective departments. He is to inform Congress of the state of the Union and recommend measures to it. He is to issue commissions to all officers of the United States and is to convene Congress in extra session and adjourn it in case of disagreement between the houses.

The Constitution does not mention the cabinet and does not recognize it as a legal body. There has crept into some statutes, loosely drawn, the expression "cabinet officer," and the Supreme Court occasionally, in its discussion of executive power, has used the term. The Constitution does not seem to contemplate a meeting in council upon the state of union of the heads of departments. English history in this regard furnishes an analogy. The cabinet is not a statutory body in Great Britain. It exists by custom only.

Indeed, the whole system of responsible government by which a vote indicating a want of confidence in the premier and his associates requires their resignation, while in the English sense it is constitutional, only abides in custom. The English premier, in selecting his associates in his cabinet, takes members of Parliament who will effectively co-operate with him in retaining the indispensable backing of the majority. The members of the cabinet in such a government are of independent strength, and their respective voices, therefore, naturally have more importance due to that fact. Each as a member of the government must be prepared, on the floor of one house or the other, to answer questions, defend the government, and advocate the legislation which it urges and for which it becomes responsible. An English cabinet officer must, therefore, have qualifications not necessarily required of a member of a presidential cabinet.

Without any violation of constitutional limitation, Congress might well provide that

heads of departments, members of the President's cabinet, should be given access to the floor of each house to introduce measures, to advocate their passage, to answer questions, and to enter into the debate as if they were members. This would impose on the President greater difficulty in selecting his cabinet, and would lead him to prefer men of legislative experience who have shown their power to take care of themselves in legislative debate. It would stimulate the head of each department to more thorough investigation into its actual operations and to closer supervision of its business. On the other hand, it would give the executive what he ought to have—some initiative in legislation, and an opportunity for the presence of competent representatives who could keep each house advised of facts in respect to the operation of existing legislation and to what is actually doing in the government, which it seems impossible for Congress easily to learn either through the investigation of committees or by formal request for papers and informa-

tion. The time lost in Congress over useless discussion of issues that might be disposed of by a single statement from the head of a department no one can appreciate unless he has filled such a place.

No official minutes are kept of the cabinet meetings. The meetings are entirely at the call of the President, and he may dispense with them altogether if he chooses. Everything is informal. The seats of the cabinet members are assigned around the cabinet table according to official procedure, with the President at the head, and that is the only observance of a form that I know of.

The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Mr. Robert T.

Lincoln told me that in his father's day, great as the business must have been during the war, there was practically no correspondence except what was purely personal, carried on in the executive office by two or three clerks. Everything was referred to the different departments for disposition, with sometimes a memorandum by the President. Now the business has grown so that it requires twenty-five clerks and stenographers to do the necessary work.

Mr. Lincoln is said to have remarked that in the cabinet, after discussion and an intimation of opinion, there was only one vote, and that was the vote of the President. It is interesting and instructive to note Jefferson's comment on the operation of the cabinet in Washington's day. In a letter, written after he had left office, to a French publicist who had advocated a plural executive, he dissented and approved the plan of our Constitution as follows:

> The failure of the French Directory seems to have authorized a belief that the form of a plurality, however

promising in theory, is impracticable with men constituted with the ordinary passions. While the tranquil and steady tenor of our single executive, during a course of twenty-two years of the most tempestuous times the history of the world has ever presented, gives a rational hope that this important problem is at length solved. Aided by the counsels of a cabinet of heads of departments, originally four, but now five, with whom the President consults, either singly or all together, he has the benefit of their wisdom and information, brings their views to one centre, and produces an unity of action and direction in all the branches of the government. The excellence of this construction of the executive power has already manifested itself here under very opposite circumstances. During the administration of our first President, his cabinet of four members were equally divided by as marked an opposition of principle as monarchism and republicanism could bring into conflict. Had that cabinet been a directory, like positive and negative quantities in algebra, the opposing wills would have balanced each other and produced a state of absolute inaction. But the President heard with calmness the opinions and reasons of each, decided the course to be pursued, and kept the government steadily in it, unaffected by the agitation. The public knew well the dissensions of the cabinet, but never had an uneasy thought on their account, because they knew also they had provided a regulating power which would keep the machinery in steady movement.

He then proceeds to tell of his own administration, in which the cabinet was so selected as to produce wonderful harmony. He says:

There never arose, during the whole time, an instance of an unpleasant thought or word between the members. We sometimes met under differences of opinion, but scarcely ever failed, by conversing and reasoning, so to modify each other's ideas as to produce an unanimous result. Yet, able and amicable as the members were, I am not certain this would have been the case had each possessed equal and independent powers. Ill-defined limits of their respective departments, jealousies, trifling at first, but nourished and strengthened by repetition of occasions, intrigues without doors of designing persons to build an importance to themselves on the divisions of others, might, from small beginnings, have produced persevering oppositions. But the power of decision in the President left no object for internal dissension, and external intrigue was stifled in embryo by the knowledge which incendiaries possessed, that no division they could foment would change the course of the executive power.

As strong an instance of opposition forces as those depicted by Jefferson in Washington's day could be found in Lincoln's, and the advantage of that single vote of the President was then even more emphasized.

The power and duty of the President to inform Congress on the state of the Union, and to recommend measures for its adoption, need very little comment, except to say that President Washington and President Adams treated this as a reason for visiting in person and delivering their messages orally. The Senate in Washington's day was a small body of twenty-six or twenty-eight, and at first when he had made a treaty, or was about to make a treaty, and wished the advice and consent of the Senate, he would repair in person to the Senate chamber. He made a treaty with the Indians through the assistance of General Knox, afterward secretary of war, who was an expert on Indians in those days, and he took Knox with him to the Senate. He found the Senate disposed to postpone confirmation until they could consider the matter. Maclay, a senator, describes the scene, and paints in strong language the evident impatience and anger of Washington at what he regarded as unnecessary delay.

When Jefferson came into office he had no facility in public speaking, and he, therefore, preferred to send written messages, and that had been the practise down to the present administration, when President Wilson has introduced the custom of a personal address to both houses. I think the innovation is a good one. I think it fixes the attention of the country on Congress and thus that of Congress on the recommendations of the President. I cannot refrain from a smile, however, when I think of the oratory which is lost because Mr. Roosevelt or I did not inaugurate such a change. The eloquence that would have resounded from the followers of Jefferson in denouncing a return to royal ceremony and the aping of "the speech from the throne" can be supplied with little effort of the imagination.

It is the duty of the President to issue commissions to all officers of the United States. This, I think, is the greatest manual duty the President has to perform. When you consider all the officers in the government

who are entitled to commissions, and the amount of correspondence that he has personally to sign, you can understand that a substantial part of each business day is taken up with signatures, and that the shorter the name the easier the work. As I was able to sign with six or seven letters, I had an advantage. In Washington's day, and later, all the letters patent for land and inventions had to be signed by the President, but, fortunately for his more recent successors, Congress has authorized the President to designate some one else to perform this duty. I don't suppose Congress could relieve him as to commissions in view of the mandatory language of the Constitution.

The question of commissions seems a simple and formal one, and yet out of them came a great case, Marbury *vs.* Madison. The question presented in it was whether in an original suit in mandamus, brought under an act of Congress authorizing such a suit in the Supreme Court of the United States, a writ should issue on the application of Mar-

bury to compel Madison, then secretary of state, to deliver him his commission as justice of the peace. Marbury had been appointed and confirmed a justice of the peace for five years in the District of Columbia. His commission had been signed by President Adams and delivered to John Marshall, his then secretary of state, just before the end of Mr. Adams's term. Mr. Marshall had left the commission with his successor, Mr. Madison. The judgment of the court was that, as the Constitution gave the Supreme Court only appellate jurisdiction in such a case, Congress had no power to pass the act which gave it original jurisdiction in this case, and that, following the fundamental law, the court was bound to ignore the act as null, to refuse to take the jurisdiction, and to dismiss the petition. The conclusion involved the principle of transcendent organic importance that makes Marbury *vs.* Madison the greatest judgment ever rendered by the court.

It asserted the power and duty of the court, in litigated cases before it necessarily involv-

ing the question, to declare an act of Congress which was in conflict with the Constitution to be null. But the chief justice was not content with this, and insisted on investigating the merits of the case, jurisdiction of which the court must decline to take. He found that it was the ministerial duty of the secretary of state under the facts to deliver the commission to Marbury, and that if the court had had jurisdiction it would have been a case for a mandamus.

In my early days in Washington, when I was solicitor-general, I had as an associate Assistant Attorney-General Maury. Born in Washington of a Virginian family, his father was mayor of Washington when Washington had a mayor. In the South more than in the North, because they are more homogeneous people, traditions are preserved, especially among lawyers and politicians. He told me of a family tradition that Marshall, who was acting as secretary of state as Adams retired, even after he had been appointed, confirmed, and commissioned as chief justice,

turned over the office of secretary of state to Madison. It was just after the new circuit judges appointed by Adams, called the "midnight judges," all Federalists, had been confirmed and commissioned. Madison was strenuous in gaining possession of the State Department. Mr. Marshall is reported to have said that, so eager was Mr. Madison to take possession of all there was in the State Department, he felicitated himself that he got away without losing his hat. The "midnight judges" were eliminated by Jefferson's Congress through a repeal of the bill creating the court. The validity of this action was questioned, and fear that the Supreme Court might hold it invalid led to an adjournment of the court for a year by Congress. When the court met after its long adjournment, the chief justice could not resist thus going out of his judicial way to take a shot at Jefferson, a course which Jefferson did not fail to animadvert upon in his usual epistolary method. Though unnecessary to the decision, the principle of law laid down by

Marshall as to the right of a court to mandamus the head of a department to do a ministerial duty has been followed by the Supreme Court in several cases, and the present executive practise as to when a commission is irrevocable is in accord with his opinion.

The power to convene Congress in extraordinary session, and the power to adjourn Congress when the houses disagree as to the adjournment, is given in one clause, which reads as follows:

> He may on extraordinary occasions convene both houses or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

When I convened Congress in extra session to pass the reciprocity bill, the leaders of the Democratic majority of the house were very fearful that the Senate might attempt to adjourn after the reciprocity bill was passed and that the house might not have

the opportunity of passing some political measures for political use in the next election. So they came to me to know whether I would exercise the power of adjourning the houses under those conditions. It had been reported that that was my plan. I had never thought of it, and was able to assure them that I had not thought of it and did not intend to exercise the power. I observe in the recent controversy as to the adjournment of Congress that some persons appealed to the President to adjourn this Congress, that is, to exercise what his political opponents, in the same old way, would have called the royal prerogative of proroguing Congress. In my examination of the clause, I was inclined to think at the time that the power of adjournment of the President was probably limited to the adjournment of an extra session of Congress, but, as the question never arose, I did not give it full consideration. As I read it now, I am inclined to think that the power of adjournment is not limited to that of an extraordinary session,

and, therefore, that in the present case President Wilson might, although the session is a regular session, have adjourned Congress. So far as I know, the power has never been exercised.

The constitutional functions of the President seem very broad, and certainly they are, but when many speak of the enormous power of a President they have in mind that what the President does goes, like kissing, by favor. Now, I beg of you, gentlemen, to believe that the presidency offers but few opportunities for discretion of that sort. The responsibility of the office is so heavy, the earnest desire that every man who fills the place has to deserve the approval of his countrymen by doing the thing that is best for the country is so strong, and the fear of just popular criticism is so controlling that it is difficult for one who has been through four years of it to remember many personal favors that he was able to confer. There are certain political obligations that

the custom of a party requires the President to discharge on the recommendation of senators and congressmen and men who have had the conduct of the political campaign in which he was successful. I hope that that kind of obligation will be reduced to its lowest terms by a change of the law. But I refer now to that kind of power that your imagination clothes the President and all rulers with, to gratify one man and humiliate another and punish a third, in order to satisfy the power, the whim, or the vengeance of the man in power. That does not exist, and the truth is that, great as his powers are, when a President comes to exercise them he is much more concerned with the limitations upon them, to see that he does not exceed them, than he is affected, like little Jack Horner, by personal gratification over the big things he can do.

The President is given a house to live in, a very comfortable, homelike house. In all the world, I venture to say, there is no more appropriate official residence for a chief exec-

utive, nor one better adapted to the simple, democratic tastes of the American people, than the White House at Washington. It is dignified, it is beautiful, it is comfortable, it offers an opportunity for proper entertainment of the President's guests, but, as compared with the many palaces of Europe, it is much less extensive and much less ornate, and yet it is quite enough to surround him with that comfort and freedom from intrusion that the chief executive ought to have while he is executive.

There is an impression that the President cannot leave the country and that the law forbids. This is not true. The only provision of law which bears on the subject at all is that constitutional paragraph which provides that the Vice-President shall take his place when the President is disabled from performing his duties. Now, if the President is out of the country at a point where he cannot discharge the necessary functions that are imposed on him, such disability might arise; but the communication

by telegraph, wireless, and by telephone is now so good that it would be difficult for a President to go anywhere and not be able to keep his subordinates in constant information as to his whereabouts and his wishes. As a matter of fact, Presidents do not leave the country very often. Occasionally it seems in the public interest that he should. President Roosevelt visited the Canal Zone for the purpose of seeing what work was being done on the canal and giving a zest to that work by personal contact with those who were engaged in it. I did the same thing later on, travelling, as he did, on the deck of a government vessel, which is, technically, the soil of the United States. The Zone is the soil of the United States. He was not out of the jurisdiction of the United States except for a few hours. He went into the city of Panama, as I did, and dined with the President of the Panamanian Republic. So, too, I dined with President Diaz at Juarez, in Mexico, just across the border from El Paso, but nobody was heard to say that in

any of these visits we had disabled ourselves from performing our constitutional and statutory functions.

The assassination of three Presidents has led Congress to provide that the chief of the secret service shall furnish protection to the President as he moves about, either in Washington or in the country at large. I presume that experience shows this to be necessary. While President, I never was conscious of any personal anxiety while in large crowds, and I have been in many of them. Yet the record of assaults upon Presidents is such that Congress would be quite derelict if it disregarded them. It is a great burden on the President. He never can go anywhere that he does not have to inflict upon those whom he wishes to see the burden of the presence of a body-guard, and it is a little difficult to get away from the feeling that one is under surveillance himself rather than being protected from somebody else. The secret-service men are level-headed, experienced, and of good manners, and they

are wise in their methods, and they are most expert in detecting those from whom danger is most to be expected. I mean the partially demented and cranks. If a person is determined to kill a President, and is willing to give up his life for it, no such protection will save him. But such persons are very rare. The worst danger is from those who have lost part or all of their reason and whom the presence of a President in the community excites. I may be mistaken, but it seems to me that with the experts that we now have, and the system that is now pursued, the assassination of President McKinley at Buffalo might possibly have been avoided. The presence of the assassin with a revolver under his handkerchief would now be detected long before he could get within range of the object of his perverted purpose.

The President so fully represents the party that secures political power by its promises to the people, and the whole government is so identified in the minds of the people with his personality, that they make

him responsible for all the sins of omission and of commission of society at large. This would be ludicrous if it did not have sometimes serious results. The President cannot make clouds to rain, he cannot make the corn to grow, he cannot make business to be good, although when these things do occur parties do claim some credit for the good things that have happened in this way. He has no power over State legislation, which covers a very wide field and which is in many respects closer to the happiness of the people than is the federal government. But the federal power has expanded so much in volume with the growth of interstate commerce and in the discharge of other national functions that there is a disposition on the part of many, even of some who ought to know better, to urge that because in their judgment States have not shown themselves as active as they ought to be in suppressing evils and accomplishing good, this fact ought to give the United States Government additional authority, and they seem to contend

that the President and Congress should assume such new functions. Of course, this would break up our whole federal system. The importance of that system is frequently misunderstood. Its essence is in the giving through the States local control to the people over their local affairs, and confining national and general subjects to the direction of the national government. Our experience with the administration of the public lands, with the control of our national mineral wealth, with the irrigation system of arid lands which we have undertaken, and with the disposition of the many sources of water-power owned by the United States, all show that it is exceedingly difficult for the central government to administer what in their nature are local matters and put into force a national policy that may often be at variance with the local view. Such a centralized system of government, in which the President and Congress regulated the door-steps of the people of this country, would break up the Union in a short time, and those who, therefore,

lightly call for the extension of the power of the federal government really don't understand the dangerous proposition that they are urging.

Then there is a class of people that think that the government ought to do everything, ought to regulate everybody and everything—that is, to regulate other people, not themselves—and these political philosophers visit the President with responsibility for everything that is done and that is not done. If poverty prevails where, in their judgment, it should not prevail, then the President is responsible. If other people are richer than they ought to be, the President is responsible. While the President's powers are broad, he cannot do everything. The lines of his jurisdiction are as fixed as a written constitution can make them. He has tremendous responsibilities. He is doing the best he can. And while we may differ with him in judgment, while we may think he does not bring the greatest foresight to his task, that he may select poor instruments

for his assistants, we must remember that he is the head of our government, that he represents our nationality and our country, and that it is our duty as citizens and patriots to uphold his hands, to give him credit for a high sense of duty and a conscientious discharge of it. High ideals and disciplined intelligence, as a great university like this inspires, impose on us a special responsibility as gentlemen and Americans to conduct ourselves as friends of constituted authority, as supporters of those upon whom the people have conferred leadership, and as respecters of their learning, experience, and high patriotic purpose.

They should make impossible a flippant want of respect for the office the President holds, or of himself as its occupant, because it was the American people who chose him, and for the time being he is the personal embodiment and representative of their dignity and majesty. —

## II

One of the great functions of the executive which, in a practical way, gives him more personal power than any other conferred on him is that of appointments to office. It is a power that fixes his responsibility for the whole federal government, which maintains a personal presence, so to speak, in every local community throughout the vast stretch of national jurisdiction, by the activities of nearly six hundred thousand civil and military servants. In the days before the civil-service law a sense of obligation to the President for the places held produced a political loyalty in civil employees as presidential henchmen. In those halcyon times even the humblest churchman or janitor felt a throb of deep personal interest in the political life of the President.

Ambassadors, public ministers, consuls, judges of the Supreme Court, and other offi-

cers of the United States whose appointment is not otherwise provided for, are to be appointed by the President, with the advice and consent of the Senate. Congress is permitted to vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. Heads of departments could hardly be called inferior officers, and the language of the Constitution leaves it doubtful whether Congress could give the selection of his cabinet to the President without the confirmation by the Senate. The question will not trouble us, for the Senate is never likely to consent to waive its present right to pass upon the President's choice of his official family.

It was settled as long ago as the first Congress, at the instance of Madison, then in the Senate, and by the deciding vote of John Adams, then Vice-President, that the power of removal was incident to the power of appointment, and that the advice and consent of the Senate was not necessary to make the removal effective. Congress sought to re-

verse this principle of long standing by the Tenure of Office Act in Andrew Johnson's time. Its first section continued a person in an office in which he had been confirmed by the Senate until the appointment and qualification of his successor, and the act further especially provided that a head of a department should hold his office during the term of the President who appointed him, and should be subject to removal only by consent of the Senate. This grew out of Mr. Johnson's removal of Mr. Stanton from the war office. The act was the result of partisan anger against Mr. Johnson. Much of it was soon repealed at President Grant's request. It never came before the courts directly in such a way as to invoke a decision on its validity, but there are plain intimations in the opinion of the Supreme Court that Congress exceeded its legislative discretion in the act.

The effect of the power of appointment upon the President's prestige and control in Congress is shown in the gradual impairment

of his influence with members of Congress as his term lengthens and the offices that he has to fill become fewer in number. This is true of the most popular of Presidents.

Appointments, except to the more important offices, ought to be in some practical way removed from the presidential duties. The President should not be required to give his time to the selection of any except the judges of the courts, the heads of departments, the political under or assistant secretaries in each department, the ambassadors, public ministers, general officers in the army, and the flag-officers in the navy. This could be done by putting all other offices into the classified service, under the present civil-service law. An appointment subject to confirmation by the Senate cannot, in the nature of things, be put in the classified service. The law, therefore, should enable the President to fill all other offices without the advice and consent of the Senate, and then he could classify them all—the merit system could be introduced

in appointments and promotions. Thus all the local officers throughout the country—the postmasters, the collectors of internal revenue, the collectors of customs, and all their subordinates—could be given permanent tenure, appointed and promoted after examination and upon proved efficiency.

Any discussion of the executive function of appointments would be lacking which did not make some reference to solemn arguments of solemn senators which take up so many pages of that solemn publication the *Congressional Record* in the effort to enlarge the meaning of the words "advice and consent" of the Senate, used in describing the part the Senate plays in the matter of appointment and in treaty-making.

The usual contention is that these words require that the President should always, before making a nomination or negotiating a treaty, consult the Senate, and this in the face of a hundred years of a general practise to the contrary. To use Skipper Jack Bunsby's language, as reported in *Dombey and*

*Son*, "the bearings of this observation is in the application on it." From this general construction of "advice and consent" it is easy for one imbued with the sacred awfulness of the Senate's functions in government to follow a course of reasoning which leads to the conclusion that a Republican President, under the Constitution and the courtesy of the Senate, must consult the Republican senators from a State before making appointments in that State, but that no such constitutional obligation is upon him in respect to Democratic senators. This is not humorous, much as it may seem to be. A senator asked me to appoint two men, one to be district attorney and the other his assistant in his State, and requested that they be allowed to divide the aggregate salaries of the two offices equally. When I declined to do so he requested the appointment of one of the two—to the chief office. I did not think him competent, upon investigation, and was confirmed in this opinion by his willingness to accept the office under

the arrangement first suggested. I nominated another lawyer of much higher capacity and standing, also a political supporter of the senator. He nevertheless fought the nomination on the ground that with devilish ingenuity I had sought to embarrass him, and contended before the judiciary committee that he did it on principle. While he admitted the competency and high character of my nominee and his proper political views, he argued that as his advice to me had been different, and as he in such local matters represented the Senate, the appointment should not be confirmed, in his view of the constitutional function of the Senate in appointments.

I cannot exaggerate the waste of the President's time and the consumption of his nervous vitality involved in congressional intercession as to local appointments. As long as these remain political the expense of the administration of the offices will be largely more than it need be. I venture the assertion, after long experience, that, if

the important local offices all over the country under the federal government were put in the classified service, an expert examination of those offices would satisfy Congress and the appointing power that the assistant postmasters, the assistant collectors of internal revenue, and the assistant collectors of customs could run the offices better than they are now run with a political chief in each, and that the only change needed would be to increase, by a small percentage, the salaries of the assistants. In this way nearly the whole of the salaries of the present political chiefs all over the country in these local offices could be saved to the government. Annually for four years I recommended that the Congress change the method of appointing the postmasters, collectors of internal revenue, and collectors of customs by removing the necessity for confirmation by the Senate, promising that if this were done I would put all these officers under the classified service. But my urgent recommendations fell upon deaf ears. No President, so

far as I know, has been able to break away from this custom. There have been notable instances, as in the case of the issue between President Garfield and Senator Conkling, where the President asserted his right to act without the recommendation of the senator in a New York appointment. In the Garfield-Conkling controversy it was not a question of civil-service reform. The issue was political. It was only a question whether a Conkling man should be replaced by a Blaine man, and it was to repay a political debt of Mr. Blaine and Mr. Garfield that Judge Robertson was appointed. Mr. Garfield did not change the custom except in this case. Congressmen and senators believe that by this custom they can maintain a local political organization which will assist them to be re-elected. It usually hurts more than it helps the particular user in the long run; but it does help to strengthen local machines and bosses. If the persons and parties contending for the abolition of bosses and the suppression of machines in Con-

gress would show the faith and sincerity that ought to be in them, they could promote the cause which they so loudly proclaim most effectively by passing the law to which I refer.

The law puts the appointment of clerks of courts in the judges. Judges are men, and when they are given executive or quasi-political functions—that is, when they exercise patronage—they have proven to be quite like other men. Clerks appointed in federal districts become part of the family of the judge. They take pride in the earnings of their offices, and they are prone to overcharges in fees. The favor they enjoy with the judge as part of his family has, I am sorry to say, led to abuses, and the reluctance that some judges have to call them to strict account in the management of their offices is too well known to the head of the department of justice and to his inspectors whose duty it is to examine their accounts. When I was in office I recommended that the President have the power of removal of such

clerks for cause upon the report of the attorney-general, but no such action was taken, although there were a number of flagrant cases presented justifying the recommendation. With nearly one hundred clerks of courts, and with a larger number of deputies spread all over the United States, the influence that can be used with members of Congress in a matter that is not acutely political only those who have had occasion to meet it can fully understand. In order to protect the judges against their unjudicial selves in extrajudicial matters, I would remove all patronage from courts.

I would vest the appointment of receivers in equity to take charge of railroads by the federal court in the Interstate Commerce Commission. They could be made, of course, quite as subject to the direction of the court, though appointed by another authority, as if appointed by the court itself. I know whereof I speak as to the wisdom of such a change. For eight years I acted as a circuit judge, and during much of that time I

was engaged, through receivers, in operating many thousands of miles of railroads within my circuit. The executive power the court is thus called upon to exercise is not good for the court, creates antagonisms that ought to be avoided, and interferes with the proper discharge of normal judicial functions.

The President takes an oath that he will execute the office of President and preserve, protect, and defend the Constitution of the United States, and it is made his especial duty to take care that the laws be faithfully executed. This is the widest power he has. In carrying out, through the proper department and the proper subordinate officers, the direction of the statutes of Congress, his course is usually clear. His duties thus directed flower out in such a way that few people understand their extent until they study the practical working of our government organization. Many of these duties are quasi-legislative and quasi-judicial. In order to make the statutes practical, Congress

often finds itself obliged to confer upon the particular subordinate of the President who is to carry out the law the power to make rules and regulations under it which are legislative in their nature. These regulations are made that those who are affected by its terms, both government officers and the public, may know how they can comply with it. If you would know the importance, difficulty, and wide discretion involved in this task, I commend you to the present income-tax law and the main strength that has had to be used in formulating workable regulations for its operation and enforcement.

This duty of preparing regulations for the enforcement of the statutes involves their construction. Statutory construction is practically one of the greatest of executive powers. Of course ultimately where the statute affects private right it may come before the courts; but there are many statutes that do not affect private right in such a way that they can be made the subject of litigation.

Then congressional legislation frequently imposes pecuniary liabilities as upon taxpayers. After taxes are collected, executive tribunals have to be formed to pass on the claims for the return of taxes claimed to be illegally collected.

Taxes must be collected according to due process of law, but Congress is not required to furnish an opportunity for judicial construction of the tax laws. It may vest final decision in any executive officer. It has not generally done this, but has ultimately given an opportunity for the taxpayer to appeal to the federal courts. At present most customs litigation ends in a special court of final customs appeals, which is a real court.

Congressional legislation often confers on those who comply with its conditions property rights or valuable privileges. Tribunals, executive or judicial, are given jurisdiction to pass upon claims seeking such rights or privileges. The application for a patent for an invention is made to the commissioner of patents or a subordinate, but provision is

made for an appeal from his decision to the secretary of the interior and then to a court of last resort. Soldiers' pensions, however, and patents under the homestead and other general land laws for government lands are granted after a hearing before an executive tribunal. Under the immigration acts are officers exercising quasi-judicial power, subject to review by the head of the department only, for the purpose of determining the eligibility of immigrants to enter this country or the necessity for deportation of those who have illegally entered. Consider the drawing of money from the national treasury under an appropriation act. The drawing of the warrant must be approved by the comptroller of the treasury. It is for him to say whether, under the statute, the warrant is lawful and the money can be drawn. He is an appointee of the President, and if the President does not like him as a comptroller, and his decisions, he can remove him and put in another one; but the President cannot control or revise his decisions. His

work is like the other work that I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may usually carry his case into the Court of Claims; but if he decides for the claimant, the public and those interested in maintaining the side of the government have no appeal and his decision is final.

Originally claims against the government could not be heard in court. The government did not permit itself to be sued; the claims were passed upon by executive officers and were referred to Congress for its consideration and action by appropriation. Now a Court of Claims has been established, with jurisdiction to hear and adjudge suits against the United States based on contracts, express or implied, and in a narrow class of torts. Judgments in the court of claims are certified to Congress for payment and are subject to review by the Supreme Court of the United States. This development from the decision of the executive officer upon claims dependent on government concession

or grant into, first, an executive tribunal and, finally, into a real judicial hearing before a court is only an instance of the natural tendency of the Anglo-Saxon to make a hearing as fair and equitable as is consistent with the effective operation of the government purpose. It was seen originally in the growth of the Court of Chancery from the arbitrary discretion of the Lord Keeper in dealing with the litigants at common law and ameliorating its rigidity. The creation of many executive commissions has given rise to qualms in the minds of some lest we are departing from those forms of proceeding intended to protect individual right. It may well be pointed out that the necessary trend in all such executive tribunals is toward a due judicial process.

The express duties defined in the statute and distributed to the departments and to the various appointees of the President create a great permanent organization over which he can exercise only a very general supervision. Under the civil-service laws,

inadequate as they are in some respects, the continuity of the government in the departments at Washington is fairly well settled and is little changed from administration to administration. It would be difficult, if the President chose to exercise the power he has, to impose his personality minutely on the going government. He can insist upon greater economy. He can infuse a spirit in the service by making plain his earnest desire for greater efficiency. While he is the head of this permanent structure, however, it seems to have an impersonal entity independent of him which in some degree modifies his responsibility for its operation. There are in the civil service in Washington chiefs of divisions and assistant chiefs of bureaus who have been there for decades. They are loyal to the government and not especially beholden to any one President. They are as important in the army of civil servants as the old non-commissioned officers are in a military force. They have far greater experience than the heads of their

departments and bureaus who change every presidential term. Their lifelong fidelity and efficiency are not rewarded by notices in head-lines. They have true philosophy, and are content with small salaries, permanent tenure, the consciousness of duty well done, and the flattering dependence upon them that their immediate superiors feel.

Outside of this normal operation of the regular vast machine of government, in many respects automatic, of whose workings he hears little except when there is somewhere a break in it or a palpable need of repair, the President's chief concern is in following a path not so clearly beaten.

The laws that he must take care shall be faithfully executed are not confined to acts of Congress. That body frequently fails to pass laws which are needed to make the course of the executive plain in cases of governmental necessity, and he has often been obliged to spell out a constitutional or legal obligation and authority to meet the necessity.

The treaties of the United States with other countries, under the Constitution, are laws of the United States, having effect as municipal law, in respect of those of their provisions that were intended so to operate, and are in form appropriate to such operation.

By Article XXVII of Jay's Treaty with England, it was agreed

> that His Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the offense had there been committed.

Congress, during Mr. Adams's administration, passed no law to carry out this article and made no provision, as it has done since in all such cases, for any examination of the

accused before a court as the basis for granting a warrant of extradition. A subject of Great Britain committed a murder on the high seas on a British naval ship and then escaped to South Carolina. He was there apprehended and brought before the federal court for commitment on the charge of murder and piracy against the statutes of the United States. President Adams wrote to the examining judge that he thought there was no jurisdiction over the offense in a court of the United States; that the crime as charged had been committed within the jurisdiction of Great Britain and was within the treaty, and that if the judge found the evidence of the crime was sufficient he, the President, would order the prisoner to be turned over to the British agent. The judge answered that he agreed with the President there was no jurisdiction in the federal court and that the evidence was sufficient for commitment on the charge. The prisoner was extradited on the President's warrant and was tried and executed for his of-

fense. The matter was made the subject of resolutions in Congress at the instance of Edward Livingston, who was then a congressman from New York and a political opponent of President Adams. These resolutions recited that the action of the President was an interference with the judicial process, and that there was no statute authorizing an order of extradition by the President, and therefore his act was a usurpation of personal rights. John Marshall was then a member of the House of Representatives, and he made an argument which is reported in the first appendix to the fifth Wheaton. The argument has been pronounced by the Supreme Court in a judgment of Mr. Justice Gray in Fong Yue Ting *vs.* U. S., 149 U. S., 698, to be masterly and conclusive, to establish that, under the President's constitutional obligation to take care that the laws be executed, the treaty obligation of the United States was such "a law." If you read the argument you will agree with the court and Justice Gray.

A similar instance came within my own official cognizance when I was secretary of war. In the absence of the secretary of state, Mr. Root, President Roosevelt sent me to Cuba, with Assistant Secretary of State Bacon, to see if we could compose a revolution against the government, of which President Palma was the head in that republic. We found a revolution flagrant, and we felt that intervention was necessary, and the question was whether the President, without action of Congress, could use the army and navy to intervene under the so-called Platt amendment of the treaty between Cuba and the United States, which reads in part as follows:

> The government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence and the maintenance of a government adequate for the protection of life, property, and individual liberty.

I advised the President that this treaty *pro tanto* extended the jurisdiction of the

United States to maintain law and order over Cuba in case of threatened insurrection and of danger of life, property, and individual liberty, and that under his duty to take care that the laws be executed this was "a law" and his power to see that it was executed was clear.

Events followed quickly our investigation and recommendations, and I was obliged, under the authority of President Roosevelt, to summon the army and navy, and to institute a provisional government, which lasted nearly two years, restored order, and provided a fair election law, secured a fair election, and then turned the government over to the officers elected under the constitution of Cuba. The rightfulness of the President's act under this clause of the Cuban treaty was as clear as that of the President's act under Jay's Treaty, in the absence of congressional legislation. There were some mutterings by senators that under the Platt amendment Congress only could decide to take action. However, the matter never

reached the adoption of a resolution, Congress appropriated the money needed to meet the extraordinary military and naval expenditures required, and recognized the provisional government in Cuba in such a way as to make the course taken a real precedent.

Another instance of "a law" not found in an act of Congress or in a treaty is the Neagle case, 135 U. S., 1, with which you are doubtless familiar. The case was an appeal from an order of the circuit court of the United States discharging Neagle from the custody of a State court of California, under a writ of habeas corpus. Neagle had been indicted in a State court for murder for shooting and killing Terry. His petition set forth that he did this as a deputy United States marshal, in pursuance of "a law" of the United States, and that under the federal habeas-corpus statute, which secured the writ to any one in custody for an act in pursuance of "a law" of the United States, he was entitled to release. The facts were these:

Mr. Justice Field, of the Supreme Court of the United States, while on the circuit, had to consider litigation in which Terry's wife was interested and had rendered an adverse decision. Terry was his wife's counsel. For a demonstration of violence in the court-room, Mr. Justice Field sent Judge and Mrs. Terry to jail for contempt. This provoked threats by both Terry and his wife against Field's life. Field, after having held the circuit court at Los Angeles, was on his way to hold court at San Francisco, and was seated at breakfast in the railway station at Lathrop when Terry and his wife entered. Seeing Field, Mrs. Terry went back to her sleeping-car to get a revolver, while Terry approached Field and struck him from behind as he sat. Field was accompanied by Neagle, a deputy marshal, whom the attorney-general of the United States had instructed to accompany Field for the purpose of defending him against the threatened assaults of Terry and his wife. Neagle called to Terry that he was a United States offi-

cer, and asked him to desist from his assault. He refused to do so, and Neagle shot and killed him. Terry was known to be a man of violent methods, and had killed Broderick in a duel before the war.

There was no act of Congress which authorized or directed United States marshals to accompany United States judges on their circuits or to protect them from assault while travelling from one court to another. The court held that if a United States judge is attacked while on his judicial circuit, through resentment at that which he has done as a judge, the duty of the judge to act without fear or favor creates a reciprocal legal obligation on the part of the government to protect him. This, it was decided, constituted "a law" within the meaning of the Habeas-Corpus Act and the Constitution, giving authority to the President through the attorney-general to do what was done in this case.

Mr. Justice Miller, who decided the case, said:

In the view we take of the Constitution of the United States, any obligation inferable from that instrument, or any duty of the attorney-general to be derived from the general scope of his duties under the laws of the United States, is a law within the meaning of this phrase. It would be a great reproach to the system of government of the United States declared to be within its sphere, sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges in the conscientious and faithful discharge of their duties from the malice and hatred of those upon whom their judgments may operate unfavorably.

Speaking again of the injunction that the President shall take care that the laws be faithfully executed, he says:

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

He then cites the instance of the action of a captain of a United States naval vessel in compelling the surrender by an Austrian

vessel of Kotza, a Hungarian who had made his declaration of intention to become a citizen of the United States, as the action of the executive power in executing a law of the United States. He instances as of the same character action by the President in ordering the army and marshals of the United States to secure the safety of the mails, and to protect public land from trespassers, and of the attorney-general, as the agent of the President, in bringing suits to set aside fraudulent conveyances of public lands in the interest of the government without express statutory authority in any of these cases so to do.

The same principle seems to be exemplified in Logan against the United States, 144 U. S., 263–284, in which the question at issue was whether a successful combination of men to kill a prisoner in the custody of the United States marshal was a conspiracy to injure or oppress him in the free exercise or enjoyment of a right then and there secured to him by the Constitution of the

United States. There is no express declaration in the Constitution or in any statute of a right of a United States prisoner to be protected from assault. Mr. Justice Gray, in the case cited, says:

> In this case the United States, having the absolute right to hold prisoners, have an equal duty to protect them while so held against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implied a corresponding right of the prisoners to be so protected, and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.

One of the defects in our present congressional legislation with reference to our foreign relations is a failure to denounce as a crime against the United States a conspiracy to deprive an alien within our jurisdiction of rights secured to him in a treaty of the United States with the country of which he is a subject or citizen. In many of our treaties of friendship and amity—indeed, in nearly all of them—we have agreed with the other parties to the treaty that their sub-

jects or citizens being in this country shall enjoy protection of life, liberty, and property within the due process of law. The Supreme Court has said that Congress has the power to denounce such a crime. But Congress, through local opposition, has never found courage to do so, though it has been urged by successive Presidents. Where mob violence due to racial prejudice has destroyed life or property, the State authority has been proven to be wantonly helpless. The secretary of state, in answering the complaints of foreign governments upon this head, has been under the humiliating necessity of saying that, while we made an agreement, we have, as a national government, no statutory power to comply with it, and all we can do is to recommend to the State where the violence occurs to institute proceedings in its courts to punish it. The question which I wish to moot, and with diffidence answer, is whether, notwithstanding the failure of Congress to make such a violation of an alien's treaty rights a federal offense, it is not still

within the power of the President to use the army to resist threatened mob violence to such aliens, and thus to take care that the national obligation of protection to them is faithfully executed. The rioters could not be punished as criminal offenders against the federal law, but the marshals and the soldiers, on the other hand, could not be made criminally liable for any act, even to the extent of homicide, in protecting the aliens under the President's order, because the federal obligation to do so would be a law of the United States under the cases cited. This is a case of first impression that I commend to your moot courts for discussion.

Let me give another example of a law not embodied in a statute or treaty which, on account of congressional neglect to act, the President has had to see executed. By an act approved April 28, 1904, the President was directed to take possession of and occupy, on behalf of the United States, the Canal Zone, the dominion over which had been acquired under the Hay-Varilla Treaty just

then ratified. The seventh section of that act provided that all the military, civil, and judicial powers, as well as the power to make all rules and regulations necessary for the government of the Canal Zone, should be vested in such a person and should be exercised in such a manner as the President should direct, until the expiration of the Fifty-eighth Congress. The Fifty-eighth Congress expired without making provision for future government of the Zone.

I was secretary of war from 1904 to 1908, and in charge of the canal work, and the question arose as to what was to be done in this legislative lapse after the death of the Fifty-eighth Congress. I had no hesitation in advising the President, and I may add that he had no hesitation in accepting the advice, that under his duty to take care that the laws be faithfully executed, when express authority from Congress to continue a going government essential to the construction of the canal failed, he was justified in maintaining the existing government and con-

tinuing the *status quo*. Congress made no further provision for the government of the Zone for seven years, and by its acquiescence in our course vindicated our view of the President's duty. It is true that one distinguished congressman, who is now the governor-general of the Philippines, rose in his place in Congress to denounce our usurpation, but except for his lucubration on the subject nothing was said in Congress and no action was taken.

The President is the commander-in-chief of the army and navy, and of the militia when called into the service of the United States. Under this he can order the army and navy anywhere he will. Of course the instrumentality which it furnishes gives the President an opportunity to do things which involve consequences that it would be quite beyond his power under the Constitution directly to effect. Under the Constitution Congress has the power to declare war, but with the army and navy the President can

take action such as to involve the country in war and to leave Congress no option but to declare it or to recognize its existence. Indeed, war as a legal fact, it was decided by the Supreme Court in the prize cases, could exist by invasion of a foreign enemy, or by such an insurrection as occurred during the Civil War, without any declaration of war by Congress at all, and it was only in the case of a war of aggression that the power of Congress must be affirmatively asserted to establish its legal existence. Of course, what constitutes an act of war by the land or naval forces of the United States is sometimes a nice question of law and fact. It really seems to differ with the character of the nation whose relations with the United States are affected. The unstable condition as to law and order of some of the Central American republics creates different rules of international law from those that obtain in governments that can be depended upon to maintain their own peace and order. It has been frequently necessary for the President

to direct the landing of naval marines from United States vessels in Central America to protect the American consulate and American citizens and their property. He has done this under his general power as commander-in-chief. It grows out, not of any specific act of Congress, but of that obligation, inferable from the Constitution, of the government to protect the rights of an American citizen against foreign aggression, as in the Kotza incident cited by Mr. Justice Miller in the Neagle case. In practise the use of the naval marines for such a purpose has become so common that their landing does not stir up excitement, as though it were anything more than a police measure, whereas if troops of the regular army are used for such a purpose it is considered an act of war.

Thus, it would be difficult to explain the landing of our army at Vera Cruz by force as anything but an act of war, to punish the government of Huerta in Mexico for its refusal to render what the President thought

a proper apology for a violation of our international rights in the unjust arrest of some of our sailors. This act was committed before authority was given by Congress, but the necessary authority had passed one house, and was passing another at the time, and the question as to the right of the executive to take the action without congressional authority was avoided by full and immediate ratification.

In Nicaragua, in my administration, an insurrection had led to the immurement of American citizens by insurrectos and the threatened destruction of American property. The President of Nicaragua, whom we had recognized and received, whose minister we had received, called upon the government of the United States to protect its own citizens and their property, because he was unable to render them the protection which their treaty rights gave them. This led to the landing of marines and quite a campaign, which resulted in the maintenance of law and order and the elimination of the in-

surrectos. This was not an act of war, because it was done with the consent of the lawful authorities of the territory where it took place.

A rider on an appropriation bill in 1875 forbade the use of the army as a *posse comitatus* by any one unless its use was expressly authorized by act of Congress. This prevented the marshals from calling in the army to help them in enforcing the election laws. In so far as this might prevent the President from directing the army to stand by the marshal in the enforcement of the law, it aroused a very considerable doubt whether it was not an undue restriction upon the constitutional power of the President to use the army to see that the laws are faithfully executed. It was probably not an invasion of the President's authority, because by another statute, passed during the Civil War, he has the power, whenever the laws of the United States are obstructed, or its authority set at defiance by insurrection or invasion, to issue a proclamation and direct

the army to remove the obstruction and enforce law and order.

It was under this statute that President Cleveland acted when he sent General Miles to Chicago to remove the obstruction to the passage of the mails and of interstate commerce which Debs, at the head of the American Railway Union, was effecting by violence and other unlawful means. This was the case where Governor Altgelt sought to keep the army out of Illinois, on the ground that until he or the legislature requested it the President had no right to send it into the State for the purpose of suppressing disorder. President Cleveland and Attorney-General Olney earned the gratitude of all lovers of peace and good order by the firm stand which they took in this matter, and in maintaining what the Supreme Court had so often decided, that every foot of land within the jurisdiction of the United States, whether in a State or in a Territory, or in the District of Columbia, is territory of the United States upon which the laws of the

United States can be executed by the President by force which he has at his lawful command; that there is a peace of the United States, a violation of which consists in forcible resistance to its laws. Mr. Cleveland did not have to consult Governor Altgelt as to whether he should send an army to Illinois to see that the federal laws were faithfully executed there. The full legality of President Cleveland's action in this regard was sustained by the unanimous judgment of the Supreme Court in the Debs case.

The Constitution provides that the United States shall protect each State against invasion, and on the application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence; and an early statute of the United States, still in force, provides that on such an application the President may use the militia of any State, or the regular army, to suppress such insurrection. In the case of Rhode Island, as between claimants for the governorship, the court held that it was

within the power of the executive conclusively to determine, so far as that court was concerned, who was the governor of the State and what was lawful in order that he might exercise his duty under the statute, a result quite analogous to that which enables the President to recognize foreign governments and to bind all other departments of the government by his recognition.

There is a far wider exercise of the authority by the executive in his capacity as commander-in-chief than in the cases cited. It was exemplified in and after the Spanish War. Before and after the treaty of Paris was made with Spain, by which there were left in our possession as owners the Philippines and Porto Rico, and in our custody as trustees for the people of Cuba the island of Cuba, we acquired responsibilities which were met by occupation of those islands with the army and navy. In the case of Cuba this continued from 1898 until 1903, when the island was turned over to the Cuban republic. In the case of Porto Rico this con-

tinued from 1898 until the taking effect of the Foraker Act in April, 1900, and in the Philippines from August 13, 1898, when we took Manila, until March, 1902, when the President was expressly given power to establish a civil government there. During all this interval of congressional silent acquiescence in the action of the President as commander-in-chief, he directly, or through his agents appointed, exercised all the executive power and all the legislative power, and created all the judicial power of government in those territories. After suppressing actual disorder he created a quasi-civil government, and appointed an executive, a civil legislature, and civil judges, and became the lawgiver of ten millions of people for a period ranging from two years to four. Now, there was nothing new or startling in the principle of this temporary enlargement of his executive functions. Its novelty was in the great volume of power which the circumstances thrust on him and the responsibilities and the wide discretion which he had to exercise.

The validity of such action had been recognized by the Supreme Court in similar cases arising after the Mexican War, when we took over California and New Mexico.

The delay of Congress was useful in all these cases. In respect to Porto Rico, Congress probably acted too quickly, for the Foraker Act, which provided for its government, was made like the usual territorial acts in the United States, and it did not fit quite the civilization to which it was applied in this community of Spanish laws and customs. In the Philippines, under the wise and statesmanlike forecast of Secretary Root, the civil government was framed gradually in that country to suit the exigencies. Congress was quite willing to let President McKinley handle the difficult problem until experience should throw light on the situation. When it did act, it ratified everything the President had done, and continued the government which had been created by the commander-in-chief with congressional sanction.

## III

The power of the President to grant pardons and reprieves includes not only the pardon of a man after conviction, but the pardon for a criminal act before conviction or even indictment. It also enables him to grant a pardon to people of a class, by amnesty. It is one of the most difficult duties that the President has to perform. It is left to his arbitrary discretion, and the only rule that he can follow is that he shall not exercise it against the public interest. The guilt of the man with whose case he is dealing is usually admitted, and, even if it is not, the judgment of the court settles that fact in all but a few cases. The question which the President has to decide is whether, under peculiar circumstances of hardship, he can exercise clemency without destroying the useful effect of punishment in deterring others from committing crimes. The ordinary re-

sult of human punishment is that those near to the criminal, or dependent upon him, suffer in many cases more than he does, and their pitiable condition often furnishes a plea for mitigation of the penalty. There is adequate machinery in the Department of Justice to have all cases examined by an assistant attorney-general, and the cases are briefed and brought to the President, with the recommendation of the attorney-general, upon which he can safely act. It is difficult to eliminate altogether fraud and reckless misrepresentation. It has been a tradition that if a man was *in articulo mortis*, it was mercy to allow him to die out of jail and with his family. I had two noted cases of this kind, in which, after taking the utmost care to see that the state of the health of each applicant had not been misrepresented, I yielded to the applications and granted the pardons. One man died and fulfilled his contract. The other man is living to-day and apparently in better health than before he went to jail. It has been suggested to me that I

might have revoked the second pardon on account of fraud in obtaining it. I did not consider the question seriously because, while I directed an investigation, I could not find evidence of fraud. Still, it would be a novel proceeding to revoke a pardon. Though I have not looked into it carefully, I much doubt the power. Where orders have been made in the courts granting naturalization, proceedings have been entertained to set them aside as fraudulent. The analogy is hardly complete between such an order and an act of executive grace and clemency giving a prisoner freedom, the revocation of which must, if it be effective, remand him to prison.

The next power, and the final one which I shall discuss, of the enumerated powers in the Constitution, is that which the President exercises over foreign relations. The domestic executive power of the entire country is divided between the President and the governors, the legislative between Congress

and the State legislatures, and the judicial between the federal and the State courts. In regard to our foreign relations, however, there is only one executive power, only one legislative power, and only one judicial power, all federal. The President receives foreign ambassadors and appoints and accredits our ambassadors to foreign countries. This makes him our sole representative in dealing with foreign countries. He negotiates and initiates treaties. Neither the resolutions of Congress nor of the Senate control him in this. If he does not wish to make a treaty, the treaty is not made. If he makes a treaty, it has no binding force upon the United States without the consent of two-thirds of the Senate present and voting. Of course, where a treaty provision requires for its performance legislative action, as, for instance, the appropriation of money to meet payment agreed to in the treaty, congressional neglect or refusal may defeat the performance of the treaty; but it cannot affect its binding obligation. A sover-

eign nation, though it makes a treaty, has the power to break it, even though it be violating its plighted faith and doing an immoral thing. If it could not it would not be sovereign. Therefore, Congress may make a law which is binding on the courts and on the people within its jurisdiction, though the law violate a binding treaty. As an act of Congress can repeal a treaty operating as a municipal law, so a treaty can repeal an act of Congress in so far as the treaty contains provisions which in their nature can operate as law and are inconsistent with existing statute. Much confusion arises in the minds of laymen in regard to these principles, but the rule is perfectly simple when it is understood. I had a communication from a man who asked me if the Supreme Court was not very weak on the subject of enforcing our treaty obligations with other nations. The court only enforces law as it finds it, and as a treaty is a law so a statute is a law, and that which comes later repeals what was earlier with which it is inconsistent. To

hold otherwise would be to give a treaty, recognized as law under the Constitution, not the force of law but the force of constitutional restriction.

The mere power of receiving ambassadors, on first reading, would seem to mean that he ought to keep the White House open and entertain them in a friendly way, but of course it means much more. He conducts all the correspondence with other countries through the State Department. After treaties are made it falls to him in the negotiation with foreign governments, with whom they are made, to agree upon a practical construction of them. When claims of our citizens are presented, as against foreign governments, the President, through the State Department, must formulate them and state the principles upon which they rest. When claims of foreign citizens or subjects are presented against the United States, they must be considered by the State Department, and while the State Department has no power to allow the payments of them, for

that must be exercised by Congress, it may, nevertheless, make admissions with respect to them that will in a way form a precedent against the whole government. In receiving foreign ambassadors and in sending our ambassadors to foreign countries, it necessarily devolves upon the President to determine who is the head of that government. So he has the power and duty to recognize or to refuse to recognize persons claiming to be the lawful government in any state. This power of recognition is sometimes a most important one, and it is wholly within the discretion of the President. We have seen how important it is in the refusal of the President to recognize Huerta, which drove him from power by preventing him from securing the financial aid which would have enabled him probably to overcome the forces against him. Now, a similar question arises as between Carranza and Villa, and the exercise of the power is likely to have a very material effect in the result. The dissenting judges in the Neagle case ascribed the

power which the President exercised through the navy in taking Kotza, an embryo American citizen, from an Austrian corvette, in a harbor of Asia Minor, to his control over our international relations. On this ground, too, the attorney-general sustained the power of the President, in the absence of legislative or treaty action, to allow the landing of a cable from a foreign country upon the soil of the United States.

I have been greatly interested in securing the adoption of general treaties of arbitration to dispose of all justiciable questions that are likely to arise between the nations. I attempted to secure the ratification by the Senate of treaties of this kind which I had made with France and England. The Senate refused to confirm the treaties except with such narrowing amendments that it seemed to me futile to attempt to negotiate them. The turning-point was whether the Senate had the power to agree that all questions of a certain description should be submitted to arbitration and to leave to the

tribunal of arbitration the question of jurisdiction under it, that is, the issue whether a future controversy involved questions within the class. Learned senators contended that this would be an invalid delegation of the function of the Senate to a tribunal of arbitration. It would not be a delegation of the authority of the Senate any more than it would be a delegation of the authority of the President, because the Senate's function is no more sacred, and no more necessary to the making of a treaty, than is the function which the President performs. I confess I have never been able to appreciate the force of the negative argument by the Senate in regard to this matter. The question of the jurisdiction of a tribunal to hear a particular question and to decide whether the question comes within the class of questions over which the treaty gives them jurisdiction is a question of the construction of a treaty, and the construction of a treaty is one of the commonest issues between nations submitted to arbitration. The agreement to abide a

judgment as to jurisdiction in future is no more a delegation of control over foreign affairs than is an agreement to abide a judgment of an existing controversy in respect to such relations. The narrow view that the Senate has taken in this matter is inconsistent with any arbitration at all, and it precludes all useful treaties of arbitration in advance of the occurrence of the quarrel to be arbitrated. It destroys all hope of an international court for the settlement of international disputes. The position is utterly untenable as a question of constitutional law. In the light of the present war in Europe, perhaps we cannot say that the question has pressing importance, but after this war is over and after the nations are exhausted perhaps they will look at treaties of arbitration in a somewhat different light from that in which they have regarded them heretofore.

I have thus, at possibly too great length, considered the powers of the executive un-

der the federal Constitution. In theory the executive power and the legislative power are independent and separate, but it is not always easy to draw the line and to say where legislative control and direction to the executive must cease and where his independent discretionary action begins. In theory all the executive officers appointed by him, directly or indirectly, are his subordinates, and yet Congress can undoubtedly pass laws definitely limiting their discretion and commanding a certain course by them which it is not within the power of the executive to vary. Congress may repose a discretion in appointees of the President which he may not control. Thus the comptroller of the treasury, having a duty to pass upon the payments that are to be made out of the public funds, and to draw his warrant on the treasury, must decide for himself whether it is lawful for him to draw the warrant. He acts in a quasi-judicial manner in passing on the accounts and is in no sense under the President's direction. And this is true

of the action of the secretary of the interior in passing upon the question in respect to land claims. As between a court directing the action of a marshal and a contrary order of the President, the marshal is bound by law to follow the court's direction. Yet if the marshal is obstructed, and he calls upon the President to send the army to overcome the obstruction, the President cannot be compelled to act. Jackson failed to execute the mandate of reversal which the Supreme Court issued—to release a missionary convicted in a Georgia court of unlawfully entering an Indian reservation which the Supreme Court held not to be within the jurisdiction of Georgia. The court could not control the President, and so the writ went unexecuted.

The rule seems to be that Congress may not control by legislation the constitutional powers of the President when the legislation in any way limits the discretion which the Constitution plainly confers. In the matter of appointments, Presidents have been

quick to resent encroachment by Congress. In the case of Fitz-John Porter, President Arthur made a precedent which prevails. Porter had been sentenced by court martial for his alleged misconduct in failing to support Pope in the second battle of Bull Run. Twenty years after the court martial, when Porter's friends were in the majority in Congress, they passed an act authorizing the President to appoint him a colonel in the regular army. Mr. Arthur vetoed the bill, and one of the grounds he gave was that it was an encroachment on the executive power to make the creation of an office conditioned on the appointment of an individual.

When General Grant was dying at Mount McGregor, Congress, in response to a throb of sympathy and gratitude throughout the nation, wished to have him put on the retired list as a full general, but the act did not mention Grant's name. It merely provided that from among the living commanding generals the President might nominate

one and, with the consent of the Senate, appoint him to be a full general on the retired list, with full pay. That act was passed, and General Grant was reappointed three months before his death.

The extent of the right of the President to make appointments without congressional control or limitation has been strongly asserted in the present administration. A major who was, under the statute regulating promotions, entitled to a promotion to a vacancy was not a man whom the President thought ought to be promoted. He therefore passed him over and nominated the next officer in rank to the vacancy. The then attorney-general rendered an opinion that the President could not be limited in his appointment of army officers by rules as to promotion in the army contained in the Army-Organization Act. I am not aware of what action the Senate has taken. Attempt was made by some proceeding in court to prevent the passing over of the officer first entitled, but the jurisdiction of the

court could not be maintained. If Congress may not provide by law a rule of eligibility for promotion in the army and navy, or if the President may refuse to conform to such a law, it is difficult to see how Congress may exercise the power which it is given by the Constitution to raise and support armies and make rules for the government and regulation of the land and naval forces. Rules of eligibility for promotion would seem to be rules for the regulation of the army forces. No one can, however, compel the President to make a nomination, and the only method of preventing his nominating some one other than the one specified by law is for the Senate to refuse to confirm him. If the Senate confirms him, the accounting officers of the treasury will recognize him as lawfully filling the position to which he has been appointed and confirmed. I don't quite see how the validity of the President's action and that of the Senate can be tested or overthrown. This is only one of the numerous

instances in which the Constitution is practically construed by the President, without the intervention of the courts.

Then the question as to eliciting information from the executive has given rise to a large amount of controversy, beginning as far back as Washington's day. The executive has always insisted and maintained that, while either house may request information, it cannot compel it if the executive deems it to be inconsistent with the public weal to disclose what is asked.

In the trial of Aaron Burr for treason, Marshall directed a *subpœna duces tecum* to be served on President Jefferson, requiring him to bring with him papers bearing on the issue. Jefferson wrote a letter to the district attorney declining, on the ground that it would interfere with his official duties, to attend. This has formed a precedent ever since.

In the last days of Grant's administration, when the House of Representatives was Democratic, and when President Grant

was being criticised for spending some of the hot months at Long Branch, the House of Representatives sent a resolution asking for information as to how many executive acts were performed at other places than the seat of government. The inquiry evidently aroused the general, for his declination to furnish the information is quite spirited. He declined to admit that under the Constitution he was obliged to perform acts at the seat of government, and proceeded to show, by historical reference, that many acts by former Presidents had been performed elsewhere than at the then federal capital. In addition, he filed a statement of the time spent at the seat of government by each President, from which it appeared that the President who was more often absent from Washington and the seat of government than any other was Mr. Jefferson, a full quarter of whose time was spent at Monticello. This ended the curiosity of the Democratic house.

Another respect in which the President's

authority could not be invaded by legislation is in preventing his use of the army to execute the laws. He is charged in the Constitution with the duty of taking care that they be faithfully executed, and he is made commander-in-chief of the army and navy, evidently for the purpose of enabling him to perform the duty enjoined on him in respect to the laws by use of the army and navy under his control. For Congress to say that he cannot use it as such an instrument would be interfering with that exercise of executive power that seems to be intended by the fundamental law. Of course, Congress may not exercise the right of pardon, it may not issue an amnesty, and it may not control the President in his management of foreign relations in the initiation of a treaty, in the conduct of correspondence, in the transmission of messages and resolutions affecting foreign countries and intended to express the opinion of Congress. The President may withhold transmission of them.

In my administration the lower house

passed a resolution directing the abrogation of the Russian Treaty of 1832, couched in terms which would have been most offensive to Russia, and it did this by a vote so nearly unanimous as to indicate that in the Senate, too, the same resolution would pass. It would have strained our relations with Russia in a way that seemed unwise. The treaty was an old one, and its construction had been constantly the subject of controversy between the two countries, and therefore, to obviate what I felt would produce unnecessary trouble in our foreign relations, I indicated to the Russian ambassador the situation, and advised him that I deemed it wise to abrogate the treaty, which, as President, I had the right to do by due notice couched in a friendly and courteous tone and accompanied by an invitation to begin negotiations for a new treaty. Having done this, I notified the Senate of the fact, and this enabled the wiser heads of the Senate to substitute for the house resolution a resolution approving my action, and in this way

the passage of the dangerous resolution was avoided.

The courts are very careful in exercising control over the executive where a duty is merely ministerial. Where its discharge does not involve official discretion, like the issuing of a commission after it had been signed and delivered by the President to the secretary of war, as in Marbury *vs.* Madison; like the making of credits in an account which Congress had specifically directed, as in Kendall *vs.* the United States; like the issuing of a patent after everything had been completed save the mere delivery, as in United States *vs.* Shurtz, a mandamus is allowed to issue; but in other cases, where official discretion is reposed in the officer, even though that involves the legal construction of a statute, the courts have refused to control the action of the officer. Of course, they have not felt themselves bound by his construction of the statute, should it be involved in litigation before them and come before them in such a way that the rights of

the parties depend on its construction by the court; but they have always declined to interfere with the official discretion of the officer and the acts performed in the exercise of that discretion.

In Mississippi *vs.* Johnson it was sought to enjoin President Johnson from carrying out the reconstruction policy adopted by Congress in the States which had seceded and which had been conquered. The Supreme Court refused the relief asked, on the ground that the action of the President in carrying out the reconstruction acts was the performance of an official duty which the courts would not attempt to control. As I have said, they have issued writs of mandamus against heads of departments, but whether the President be exempt from this or not has not been decided by the court. If he is not subject to subpœna, as Jefferson maintained, it would seem as if he were beyond the reach of a mandamus in any case. If he should refuse, it would be difficult for the court to enforce the writ.

The court has fully conceded its duty to recognize as binding upon it the political powers exercised by the executive and the legislative departments of the government under the Constitution. Possibly the latest case of this kind is the one in which a corporation sought to evade the payment of taxes in Oregon, on the ground that the law under which they were exacted had been passed by an initiative and referendum. It was said that an initiative and a referendum were inconsistent with the republican form of government, and, as the United States guaranteed a republican form of government, such a method of taxation must be invalid under the federal Constitution. The Supreme Court said that the question whether a State had a republican form of government or not was a political question for Congress to settle, and that as long as Congress continued to recognize Oregon as a State having a republican form of government, it was not for the court to investigate the question. Congressional or executive action

in the question of national territorial jurisdiction is political and conclusive upon the court. An important case in which, as solicitor-general, I had the honor to be of counsel was this: Mr. Blaine sought to maintain, in correspondence with Lord Salisbury, that by reason of our purchase from Russia we had acquired territorial jurisdiction over the Bering Sea, and therefore that our revenue cutters might arrest Canadian schooners engaged in pelagic sealing in that sea contrary to the statutes of the United States. The government of Great Britain appeared, by Mr. Joseph Choate as counsel, in the Supreme Court, submitted to the jurisdiction of that court, and prayed for a writ of prohibition against the Admiralty Court of the United States, sitting in Alaska, to prevent that court from forfeiting and selling a Canadian fishing schooner which had been engaged in such pelagic sealing more than three miles from the shore. The Supreme Court expressed its appreciation of the compliment and confidence shown in

it by the application of a foreign government, but said that it was bound by the attitude of the State Department and could not re-examine the international jurisdictional issue as a judicial question for that court.

One of the great questions that the executive has had to meet in the past has been how far he might properly differ from the Supreme Court in the construction of the Constitution in the discharge of his duties. Jefferson laid it down with emphasis with reference to the sedition law, saying:

> The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were to remit the execution of it, because that power has been confided to them by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch.

And so Jackson, in his message vetoing the renewal of the charter to the bank of the United States, in respect to the opinion of the Supreme Court confirming the constitutionality of the previous charter, said:

If the opinion of the Supreme Court covered the whole ground of this case it ought not to control the co-ordinate authorities of this government. The Congress, the executive, and the court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

Mr. Lincoln, in his reference to the Dred Scott case, said:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practise. At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

I do not intend to dispute the attitude of these distinguished men, although we find that the attitude of Presidents changes somewhat as their agreement with the court in its construction varies. It is sufficient to say that the court is a permanent body respecting precedent and seeking consistency in its decisions, and that therefore its view of the Constitution, whether binding on the executive and the legislature or not, is likely ultimately to prevail as accepted law.

In closing I wish to speak of the general character of the federal executive power as limited by the Constitution and the statutes.

A Virginian statesman, Abel P. Upshur, a strict constructionist of the old school, was secretary of state under President Tyler. He was aroused by Story's commentaries on the Constitution to write a monograph answering and criticising them, and in the course of this he thus comments on the executive power under the Constitution:

The most defective part of the Constitution, beyond all question, is that which relates to the executive department. It is impossible to read that instrument without being struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the legislature is concerned, the limitations of the Constitution are, perhaps, as precise and strict as they could safely have been made; but in regard to the executive, the convention appears to have studiously selected such loose and general expressions as would enable the President, by implication and construction, either to neglect his duties or to enlarge his powers. We have heard it gravely asserted in Congress that whatever power is neither legislative nor judiciary is, of course, executive and, as such, belongs to the President under the Constitution. How far a majority of that body would have sustained a doctrine so monstrous, and so utterly at war with the whole genius of our government, it is impossible to say, but this, at least, we know, that it met with no rebuke from those who supported the particular act of executive power in defense of which it was urged. Be this as it may, it is a reproach to the Constitution that the executive trust is so ill defined as to leave any plausible pretense, even to the insane zeal of party devotion, for attributing to the President of the United States the powers of a despot; powers which are wholly unknown in any limited monarchy in the world.

The view that he takes as the result of the loose language defining the executive

powers seems exaggerated, and yet in recent years there has been advanced such a view of the executive powers that may very well arouse in men who are not such strict constructionists of the Constitution real concern if those views are to receive the general acquiescence. Mr. Garfield, when secretary of the interior under Mr. Roosevelt, in his final report to Congress used this general expression in reference to the power of the executive over the public domain:

> Full power under the Constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed wholly by the discretion of the executive, unless any specific act has been prohibited either by the Constitution or by legislation.

In pursuance of this principle, Mr. Garfield, under an act for the reclamation of arid land by irrigation, which authorized him to make contracts for irrigation works and incur liability equal to the amount on deposit in the reclamation fund, made contracts with associations of settlers by which

it was agreed that, if these settlers would advance money and work, they might receive certificates from the government engineers showing the labor and money furnished by them, and that such certificates might be received in the future in the discharge of their legal obligations to the government for water-rent and other things under the statute. It became necessary for the succeeding administration to pass on the validity of these government certificates. They were held by Attorney-General Wickersham to be illegal, on the ground that no authority existed for their issuance. He relied on the Floyd acceptances, in 7th Wallace, in which recovery was sought in the Court of Claims on commercial paper in the form of acceptances signed by Mr. Floyd when secretary of war and delivered to certain contractors. The court held that they were void because the secretary of war had no statutory authority to issue them.

Mr. Justice Miller, in deciding the case, said:

The answer which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the legislature, and the judiciary, exercise powers in some sense left to the more general definitions necessarily incident to the fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law.

In the light of this view of the Supreme Court on executive duties, it is interesting to compare the language of Mr. Roosevelt, in his *Notes for a Possible Autobiography*, on the subject of "Executive Powers," in which he says:

The most important factor in getting the right spirit in my administration, next to insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Con-

stitution or imposed by Congress under its constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people, bound actively and affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt this view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well-being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition.

Now, my own judgment is that this is an unsafe doctrine, and that it might lead, under emergencies, to results of an arbitrary character, doing irremediable injustice to private right. The mainspring of such a view is that the executive is charged

with responsibility for the welfare of all the people in a general way: that he is to play the part of a universal providence and set all things right, and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden not to do it. The wide field of action that this gives to the executive one can hardly describe because of its undefined extent. It is enough to say that Mr. Roosevelt has shown how far he thought this principle would justify him in going in respect to the coal famine and the anthracite strike which he did so much useful work in settling. What was actually done was the result of his activity, his power to influence public opinion, and the effect of the prestige of his great office in bringing the parties to the controversy—the mine-owners and the strikers—to a legal settlement by arbitration. No one has a higher admiration for the value of what he did there than I have. But if he had failed in this he proposed to take action on the principle of the extent of the

executive power which I have shown by his own words. I quote from the same book from which his other words are taken. Mr. Roosevelt says:

> In my own mind, I was already planning effective action, but it was of a very drastic character, and I did not wish to take it until the failure of all other expedients had rendered it necessary. . . . I had definitely determined that, somehow or other, act I would, that somehow or other the coal famine should be broken. To accomplish this end it was necessary that the mines should be run, and if I could get no voluntary agreement between the contending sides that an arbitration commission should be appointed which would command such public confidence as to enable me, without too much difficulty, to enforce its terms on the parties.
>
> . . . . . .
>
> Meanwhile, the governor of Pennsylvania had all the Pennsylvania militia in the anthracite region, although without any effect upon the resumption of mining. The method of action upon which I had determined was to get the governor of Pennsylvania to ask me to keep order. Then I would put in the army under the command of some first-rate general. I would instruct this general to keep absolute order, taking any steps whatever that were necessary to prevent interference

by the strikers or their sympathizers with men who wanted to work. I would also instruct him to dispossess the operators and run the mines as a receiver until such time as the commission might make its report and until I as President might issue further orders in view of this report.

Now, it is perfectly evident that Mr. Roosevelt thinks that he was charged with the duty not only to suppress disorder in Pennsylvania but to furnish coal to avoid the coal famine in New York and New England, and therefore he proposed to use the army of the United States to mine the coal which should prevent or relieve the famine. It was his intention to take the coal-mines out of the hands of their lawful owners, and to mine the coal which belonged to them and sell it in the Eastern market, against their objection, without any court proceeding of any kind and without any legal obligation on their part to work the mines at all. It was an advocacy of a higher law and his obligation to execute it which it is a little startling to find advanced by

a former President of a constitutional republic. It is perfectly evident from his statement that it was not the maintenance of law and order in Pennsylvania and the suppression of insurrection, the *only ground* upon which he could intervene at all, that actuated him in what he proposed to do. He used the expression that he would "get" the governor of Pennsylvania to call for troops from him, and then, having secured a formal authority for the use of the army to suppress disorder, he proposed to use it for the seizure of private property and its appropriation for the benefit of the people of other States. The benevolence of his purpose no one can deny, but no one who looks at it from the standpoint of a government of law could regard it as anything but lawless. I venture to doubt whether, had the exigency arisen, he would have proceeded to such extremity. I think he would have listened to those about him, who were better advised as to the constitutional limitations imposed on him by his oath of office.

I am aware that there are many who believe in government ownership of the sources of public comfort in the interest of the community at large; but it is certainly only the extremists of that school that favor the use of the army under the President to seize the needed mines without constitutional amendment or legislative and judicial action. Mr. Roosevelt, in his subsequent remarks, seems to find a justification for his general view of the limitations of executive power in what Mr. Lincoln did during the Civil War. That Mr. Lincoln, with the stress of the greatest civil war in modern times, felt called upon to do things the constitutionality of which was seriously questioned is undoubtedly true. But Mr. Lincoln always pointed out the source of the authority which, in his opinion, justified his acts, and there was always a strong ground for maintaining the view which he took. His claim of right to suspend the writ of habeas corpus, I venture to think, was well founded. Congress subsequently expressly gave him this

right, and the Supreme Court sustained his exercise of it under the act of Congress. His Emancipation Proclamation was attacked as an unconstitutional exercise of authority, but he defended it as an act of the commander-in-chief, justified by military necessity, to weaken the enemies of the nation and suppress their rebellion. Certainly the arguments that he and those who supported his action brought to sustain it have great weight. But Mr. Lincoln never claimed that whatever authority in government was not expressly denied to him he could exercise.

In my reading recently I ran across a case which attracted great attention at the time, now more than one hundred years ago. It concerned the action of another President of great popularity, great power, great mental activity, and great and equally genuine sympathy with the people and with popular government—Thomas Jefferson. Mr. Jefferson was a strict constructionist of the Constitution in theory and in practise, but, as in the case of all of us, when he had

power things looked differently to him and acts were justified in his mind and conscience on the theory that he was doing good and working for the public welfare. But, in his wide view of what he himself as President could do to preserve the public welfare, he did something that troubled him even after he left the presidency.

The owners of a large tract of land reaching to the Mississippi River, just outside of New Orleans and a part of its suburbs, claimed and exercised title over alluvial extension of that land deposited by the river as lawful accretion to their property. They gave deeds covering it and sought to exclude people of the city who took sand therefrom. In this litigation Edward Livingston, who had gone from New York to New Orleans just after the acquisition of the territory, appeared as counsel for the riparian owner, obtained judgment, and as part of his compensation received some of the land. He attempted to improve the land which had been deposited, to protect it against the

wearing of the river, and to build a canal through it. The Territorial governor was Claiborne, and the people of the town who had been shut out by the action of the local court appealed to Claiborne. He submitted the matter to Mr. Jefferson, who consulted his attorney-general, and thereupon, under avowed authority of a federal statute authorizing him to put squatters off federal domain, he issued a warrant directing the United States marshal to take possession of the land in question and to hold it for the benefit of the people of New Orleans, on the ground that it belonged to the United States. The local court issued an injunction against the marshal's complying with this order of the President. The marshal refused to obey the injunction, and, using adequate force, opened the land to the use of the people of the city, who continued to take sand therefrom, exposed the land to the danger of a flood which it was being improved to prevent, and Livingston and his associates, through

a flood, lost a very large sum of money by reason of this invasion. Livingston went to Washington twice to be heard, and was refused an opportunity to argue the case, or to know the grounds upon which action of the President had been taken, or to see the opinion of the attorney-general upon which it was based. He applied to Congress without avail. He then went into the courts of Louisiana again, and he brought suit against Jefferson personally, for trespass, in the federal court of Virginia. The suit was dismissed by Chief Justice Marshall and District Judge Tyler, the father of President Tyler, on the ground that the court in Virginia had no jurisdiction of a trespass committed on land in Louisiana. Thereafter Mr. Jefferson published a defense of his action, which brought out an answer from Livingston. Livingston was a jurist of transcendent ability, especially versed in the civil law, and he wrote an answer to Mr. Jefferson which was so convincing on the issues Mr. Jefferson advanced, and was so

replete with wit and humor and satire, that even the *British Encyclopedia* described it as crushing. In the course of this answer Livingston used some language that, it seems to me, would have been properly applicable to the proceedings which Mr. Roosevelt proposed to take, and which he frankly calls drastic. Mr. Roosevelt says there would doubtless have been an outcry against his proceedings. It would have been denounced as a usurpation; but he thinks that the good he would have done would have rallied to his support the great body of the people in whose interest he would have done it, and thus his plan would have vindicated itself. Mr. Livingston opened his answer to Jefferson as follows:

> When a public functionary abuses his power by an act which bears on the community, his conduct excites attention, provokes popular resentment, and seldom fails to receive the punishment it merits. Should an individual be chosen for the victim, little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one. The gloss of zeal for the public is therefore always spread over

facts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favor, which, when viewed in its true light, would be found a fatal blow to their rights.

In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, there aids the illusion, and a popular leader is allowed, in many instances, impunity and sometimes rewarded with applause for acts that would make a tyrant tremble on his throne. This evil must exist in a degree—it is founded in the natural course of human passions; but in a wise and enlightened nation it will be restrained; and the consciousness that it must exist will make such a people more watchful to prevent its abuse. These reflections occur to one whose property, without trial or any of the forms of law, has been violently seized by the first magistrate of the Union,—who has hitherto vainly solicited an inquiry into his title,—who has seen the conduct of his oppressor excused or applauded,—and who, in the book he is now about to examine, finds an attempt openly to justify that conduct upon principles as dangerous as the act was illegal and unjust.

I would not dwell upon this subject were it not of great current importance with reference to the course urged upon President Wilson in the maintenance of order in Colorado. He was advised to use the United

States troops to close the mines, which were running and producing a substantial part of their normal product. The closing of mines might have been a sop to those who threatened violence in case the troops were withdrawn and so mitigate their lawlessness for a time. But was it a proper method of maintaining order to deprive men of the right of property that it was the very object of the constitutional provision of federal intervention to protect? No one claimed the operation of the mines was unlawful. It was only said that their continued operation after the withdrawal of the federal troops would lead to disturbance. By whom? By the strikers. Was this not a proposition to compel an owner of property to cease its lawful use because his former employees would otherwise attempt unlawfully and violently to prevent such ûsé? This is carrying the blanket of martial law to a point that I feel certain the President thought was unjustified.

I have now concluded a review of the

executive power, and hope that I have shown that it is limited, so far as it is possible to limit such a power consistent with that discretion and promptness of action that are essential to preserve the interests of the public in times of emergency or legislative neglect or inaction. There is little danger to the public weal from the tyranny or reckless character of a President who is not sustained by the people. The absence of popular support will certainly, in the course of two years, withdraw from him the sympathetic action of at least one house of Congress, and by the control that that house has over appropriations the executive arm can be paralyzed, unless he resorts to a *coup d'état*, which means impeachment, conviction, and deposition. The only danger in the action of the executive under the present limitations and lack of limitations of his powers is when his popularity is such that he can be sure of the support of the electorate, and therefore of Congress, and when the majority in the legislative halls

responds with alacrity and sycophancy to his will. This condition can probably never be long continued. We have had Presidents who felt the public pulse with accuracy, who played their parts upon the political stage with histrionic genius and commanded the people almost as if they were an army and the President their commander-in-chief. Yet in all these cases the good sense of the people has ultimately prevailed, no danger has been done to our political structure, and the reign of law has continued. In such times, when the executive power seems to be all-prevailing, there have always been men in this free and intelligent people of ours who, apparently courting political humiliation and disaster, have registered protest against this undue executive domination and this use of the executive power and popular support to perpetuate itself. The cry of executive domination is often entirely unjustified, as when the President's commanding influence only grows out of a proper cohesion of a party and its recognition of the neces-

sity for political leadership; but the fact that executive domination is regarded as a useful ground for attack upon a successful administration, even when there is no real ground for it, is itself proof of the dependence we may properly place upon the sanity and clear perceptions of the people in avoiding its baneful effects when there is real danger.

Even if a vicious precedent were set by the executive, and injustice done, it does not have the same bad effect that an improper precedent of a court may have, for one President does not consider himself bound by the policies or constitutional views of his predecessors. The Constitution does give the President wide discretion and great power, and it ought to do so. It calls from him activity and energy to see that within his proper sphere he does what his great responsibilities and opportunities require. He is no figurehead, and it is entirely proper that an energetic and active, clear-sighted people, who when they have work to do wish

it done well, should be willing to rely upon their judgment in selecting their chief agent, and, having selected him, should intrust to him all the power needed to carry out their governmental purpose, great as it may be.

# INDEX